Kasugi Prima Sdn Bhd v Cobrain Holdings Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1146–07 OF 2023 AND W-02(C)(A)-1147–07 OF 2023

MARIANA YAHYA, AZIMAH OMAR AND WAN AHMAD FARID JJCA

7 MARCH 2025

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator could rely on own knowledge and expertise in arriving at findings under s 21(3)(b) of Arbitration Act 2005 ('AA') — Whether arbitrator's authority under s 21(3)(b) of AA invocable to matters of procedures — Whether arbitrator's invocation of authority under s 21(3)(b) of AA was not premature — Whether arbitrator in breach of rules of natural justice in arriving at decision — Whether arbitration award ought to be set aside

Kasugi Prima Sdn Bhd ('the appellant') was the main contractor to undertake the construction of Bank Kerjasama Rakyat Malaysia Bhd building ('the project'). The respondent was the subcontractor appointed by the appellant via a letter of award ('LOA') read together with articles of agreement from PAM contract 2006 (without quantities) for the contract sum of RM82.2m ('the contract'). The completion date of the project was moved from the initial date of 31 September 2012–30 September 2013 with the certificate of practical completion being issued circa June 2014. Due to the delay, the appellant contended that the respondent not only was not entitled to any further progress payments but instead (upon unilateral omissions, variations, debit notes and liquidated ascertained damages ('LAD') for delays) the respondent owed the appellant the sum of RM6,367,876.15. On the contrary the respondent contended that the appellant still owed the respondent the sum of RM8,995,122.06 for work done under the contract. In the circumstances, the respondent commenced an adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for a swift determination as to the respondent's right to be paid for work done. The adjudicator meted out an adjudication decision in favour of the respondent awarding the respondent the sum of RM5,477,387.23 and costs of RM102,689 ('CIPAA award'). The appellant sought to set aside the CIPAA award up the Federal Court but was unsuccessful. Apart from failing to set aside the CIPAA award before the court, the appellant also concurrently referred their disputations to arbitration. In due course of and before the final determination of the arbitration, the appellant still owed monies under the CIPAA award to the respondent. Thus, in the interim the parties entered into a consent order ('consent order 1') in which the appellant partially paid the

respondent the sum of RM1.5m with the remainder balance unpaid were guaranteed by way of a property pledge pending the final determination of the arbitration. Subsequently, the adjudicator meted out an award in favour of the respondent ('final award'), effectively finding that the appellant owed the respondent a sum of RM7,485,867.56 ('award sum'). However, the appellant refused to abide by the terms (the guarantee) under consent order 1 despite the arbitration having been finally determined. The appellant then applied to the court to set aside the final award. In the appellant's originating summon to set aside the final award, the parties entered into a further consent order ('consent order 2') for the payment of the award sum under the final award. Only upon the intimations of winding up and execution proceedings did the appellant accede to make partial payments to the respondent. Thereafter, before the High Court, the respondent filed an originating summon for the High Court to recognise and enforce the final award ('OS 40') while the appellant filed an originating summon set aside the final award ('OS 46'). The High Court judge ('HCJ') allowed the respondent's OS 40 and dismissed the appellant's OS 46. Accordingly, two appeals were filed by the appellant against the decision of the High Court in dismissing the appellant's originating summon to set aside an arbitration award ('Appeal 1147') on the supposed ground of procedural impropriety in primary reliance of s 21(3)(b) of the Arbitration Act 2005 ('the AA') while at the same time allowing the respondent's application to recognise and enforce the same arbitration award ('Appeal 1146'). The issues that arose for determination were: (1) whether an arbitrator's authority under s 21(3)(b) of the AA was only invocable purely as to matters of procedures (and not of fact, substance or merit); (2) whether HCJ was correct to find that the arbitrator's invocation of authority under s 21(3)(b) of the AA was not premature; and (3) whether the HCJ was correct to find that the manner in which the arbitrator had invoked her authority under s 21(3)(b) of the AA was not in breach of the rules of natural justice.

Held, dismissing the appeals with costs:

(1) It was altogether absurd to suggest that an arbitrator could only draw on their expertise and knowledge only on matters of procedures. Despite the literal words contained within s 21, the court could not simply sit idly by and allow such erroneous reading of the law defeat the very core of the law to have disputations remedied with utmost integrity, information, knowledge, and experience (see para 25).

(2) The appellant ought not contend that s 21(3)(b) of the AA would act as an inhibitor to prohibit an arbitrator from drawing on to his or her own knowledge and expertise to determine the merit and substance of the dispute. The law shall not stand in any manner that stifled intellect, justiciality, and intelligence. At best and at most, the appellant could reasonably suggest that the arbitrator ought not excessively draw on her own expertise to the extent of the arbitrator descending into the arena

and furnishing new and external evidence which were never tendered into by any respective party. But to suggest that an arbitrator could not at all be allowed even a modicum of room to tap into his or her own expertise to determine matters of merit was sheer absurdity (see paras 26–27).

(3) A cursory reading of the entirety of the subsection was sufficiently telling that the authority vested by the subsection must necessarily go beyond the confines of procedural matters and cover matters of facts in issue as it also included the authority to attach materiality and weight to, as well as determining the relevance and admissibility of any evidence (which clearly was a matter of merit and substance) (s 21(3)(a) of the AA). Thus, issue (1) was answered in the negative. An arbitrator's authority under s 21(3)(b) of the AA was not limited to only determine matters of procedures (and could be invoked to determine matters of facts, substance, and merit) (see paras 34–35).

(4) At the end of the day, even calling on the arbitrator to determine the weight, materiality, and relevance of any piece of evidence was not at all strictly just a matter of procedure. The weight and materiality of evidence was a matter that could directly determine a fact in issue. So, the appellant's insistence on a 'prior procedural disputation' was neither exactly an accurate interpretation of the provision, nor the manner in which the arbitrator should be allowed to apply her own mind to examine the evidence available within the tribunal. This was the reason the court was not inclined to agree that the arbitrator's hands were 'tied' until and unless there arise a 'preceding procedural disputation'. It was exceedingly absurd to suppose that the parliament would have intended that an arbitrator could only apply his or her own mind (in expertise and knowledge) to determine the admissibility, relevance, weight, and materiality of evidence (either documentary or viva voce) only when there arose a prior dispute of procedure (see para 40).

(5) Even if the court was wrong in agreeing with the HCJ as to the existence of a prior procedural dispute, the court was still inclined to find that it was more probable than not that the parliament would not have intended the law to unnecessarily restrict the arbitrator's authority to perform the very cornerstone of justicial or arbitral duty to apply his or her mind to examine and appreciate evidence within the tribunal before concluding his or her arbitral award. Any arbitrator should be allowed the logical and necessary room to exert his or her mind to examine the evidence before the tribunal notwithstanding whether or not there was a prior procedural dispute. To insinuate otherwise would be preposterous. Accordingly, issue (2) was answered in the positive. The HCJ was correct to find that the arbitrator's invocation of her authority under s 21(3)(b) of the AA was not premature (see paras 41–42).

(6) The instant appeal dealt with the instance in which the arbitrator had drawn upon her own expertise and knowledge to be applied as against available evidence. It did not make any legalistic sense that an arbitrator must necessarily consult the parties before applying his or her own mind to the evidence presented before him or her. To implore an arbiter to give due notice or to 'consult' the parties every time they see it proper to draw on their expertise and knowledge in collating and appreciating the evidence tendered before them was preposterous. If the court were to agree with the appellant, then all arbitrators would have to turn a blind eye to any parties' oversight (or to his own valuable knowledge and expertise upon the evidence before him) merely because the law would not have allowed the arbitrator to draw on his expertise without first 'consulting' the parties. Of which such a 'procedure' would have defeated the very essence of arbitration as a swift and timeous method alternative dispute resolution (see paras 50 & 52).

(7) Succinctly, an arbitrator is perfectly vested and entitled to draw on his or her own wealth of expertise and experience to apply his or her mind and to draw conclusions upon the evidence that was presented before the tribunal. The question of breach of natural justice only arose if an arbitrator had applied his or her own expertise to the extent of admitting pieces of external evidence which were not tendered into by the parties. On the facts of the case, the arbitrator neither ignored the evidence of the expert witnesses' nor did the arbitrator substituted the parties' contentions with her own external evidence beyond the evidence that were presented before the tribunal. The arbitrator had formed his own opinion upon due consideration of available evidence (see paras 54 & 58–59).

(8) Not a spec of the arbitrator's thought process in her deliberations were even remotely 'surprising' as she had only agonized over documents and testimonies that were tendered by the parties before the tribunal. There was not even an iota of deviation by the arbitrator in which she had admitted or referred to any external evidence. Such process of analysis and deliberation should certainly be reasonably expected and no party could insist upon the arbitrator to 'consult' the parties before the arbitrator could embark on his or her own thought processes upon the available evidence before concluding the arbitral award. Accordingly, issue (3) was answered in the positive. The HCJ was correct to find that the manner in which the arbitrator had invoked her authority under s 21(3)(b) of the AA was not in breach of the rules of natural justice (see paras 60 & 62).

[Bahasa Malaysia summary

Kasugi Prima Sdn Bhd ('perayu') adalah kontraktor utama yang dilantik untuk menjalankan pembinaan bangunan Bank Kerjasama Rakyat Malaysia Bhd

('projek tersebut'). Responden adalah subkontraktor yang dilantik oleh perayu melalui surat anugerah ('LOA') yang dibaca bersama dengan artikel perjanjian daripada kontrak PAM 2006 (tanpa kuantiti) untuk jumlah kontrak sebanyak RM82.2 juta ('kontrak tersebut'). Tarikh siap projek ini telah ditukarkan dari tarikh asal pada 31 September 2012–30 September 2013 dengan sijil siap praktikal yang dikeluarkan sekitar Jun 2014. Disebabkan kelewatan itu, perayu menghujahkan bahawa responden bukan sahaja tidak berhak mendapat sebarang bayaran pendahuluan selanjutnya tetapi sebaliknya (atas peninggalan secara sebelah pihak, perubahan-perubahan, nota debit dan ganti rugi jumlah tertentu ('LAD') untuk kelewatan responden) menyebabkan responden berhutang kepada perayu untuk jumlah sebanyak RM6,367,876.15. Sebaliknya, responden menghujahkan bahawa perayu masih berhutang kepada responden untuk jumlah sebanyak RM8,995,122.06 untuk kerja yang dilakukan di bawah kontrak. Dalam keadaan tersebut, responden memulakan prosiding penghakiman di bawah Akta Pembayaran dan Penghakiman Industri Pembinaan 2012 ('APPIP') untuk penentuan hak responden untuk dibayar untuk kerja-kerja yang dilakukan. Adjudikator membuat keputusan penghakiman yang memihak kepada responden yang menganugerahkan responden jumlah sebanyak RM5,477,387.23 dan kos sebanyak RM102,689 ('award APPIP'). Perayu cuba untuk mengenepikan award APPIP ke Mahkamah Persekutuan tetapi tidak berjaya. Selain daripada gagal mengenepikan award APPIP di hadapan mahkamah, perayu juga secara serentak merujuk pertikaian mereka kepada timbang tara. Pada masa yang tepat dan sebelum penentuan akhir timbang tara, perayu masih berhutang wang di bawah award APPIP kepada responden. Sementara itu, pihak-pihak telah memeterai perintah persetujuan ('perintah persetujuan 1') di mana perayu membayar sebahagian kepada responden sejumlah RM1.5 juta dengan baki yang belum dibayar dijamin melalui harta sementara menunggu penentuan akhir timbang tara. Selepas itu, adjudikator memberikan award yang memihak kepada responden ('award akhir') dan memutuskan bahawa perayu berhutang kepada responden wang sejumlah RM7,485,867.56 ('jumlah award'). Walau bagaimanapun, perayu enggan mematuhi terma-terma (jaminan) di bawah perintah persetujuan 1 walaupun timbang tara akhirnya telah ditentukan. Perayu kemudian memohon kepada mahkamah untuk mengenepikan award akhir. Dalam saman pemula perayu untuk mengenepikan award akhir, pihak-pihak memasuki perintah persetujuan selanjutnya ('perintah persetujuan 2') untuk pembayaran jumlah award di bawah award akhir. Hanya selepas tindakan prosiding penggulungan dan pelaksanaan, perayu bersetuju untuk membuat pembayaran separa kepada responden. Selepas itu, di hadapan Mahkamah Tinggi, responden memfailkan saman pemula untuk Mahkamah Tinggi untuk mengiktiraf dan menguatkuasakan award akhir ('SP 40') manakala perayu memfailkan saman pemula untuk mengenepikan award akhir ('SP 46'). Hakim Mahkamah Tinggi ('HMT') membenarkan SP 40 responden dan menolak SP 46 perayu. Sehubungan itu, dua rayuan telah difailkan oleh perayu terhadap keputusan

Mahkamah Tinggi ketika menolak saman asal perayu untuk mengenepikan keputusan timbang tara ('Rayuan 1147') atas alasan kesalahan prosedur kerana hanya bergantung kepada s 21(3)(b) Akta Timbang Tara 2005 ('ATT') dan pada masa yang sama membenarkan permohonan responden untuk mengiktiraf dan menguatkuasakan keputusan timbang tara ('Rayuan 1146'). Isu-isu yang timbul untuk penentuan adalah: (1) sama ada kuasa penimbang tara di bawah s 21(3)(b) ATT hanya boleh digunakan untuk perkara prosedur (dan bukan fakta, perkara asas atau merit); (2) sama ada HMT betul ketika memutuskan bahawa permohonan kuasa penimbang tara di bawah s 21(3)(b) ATT adalah tidak pramatang; dan (3) sama ada HMT adalah betul ketika memutuskan bahawa penimbang tara telah menggunakan kuasanya di bawah s 21(3)(b) ATT tidak melanggar prinsip keadilan semula jadi.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Adalah tidak masuk akal untuk mengatakan bahawa penimbang tara hanya boleh menggunakan kepakaran dan pengetahuan mereka hanya mengenai perkara prosedur. Walaupun terdapat peruntukan secara literal dalam s 21, mahkamah tidak boleh membiarkan penafsiran undang-undang yang salah yang menyalahi asas undang-undang untuk menyelesaikan pertikaian dengan berintegriti, bermaklumat, berpengetahuan dan berpengalaman (lihat perenggan 25).

(2) Perayu tidak sepatutnya menghujahkan bahawa s 21(3)(b) ATT melarang penimbang tara daripada menggunakan pengetahuan dan kepakarannya sendiri untuk menentukan merit dan inti pati pertikaian itu. Undang-undang tidak boleh menyekat pengetahuan, keadilan dan kecerdasan dalam apa jua cara. Perayu sebaiknya boleh mencadangkan secara munasabah bahawa penimbang tara tidak sepatutnya menggunakan kepakarannya sendiri secara berlebihan sehingga penimbang tara terlibat dan memberikan keterangan baru dan keterangan luar yang tidak pernah dikemukakan oleh mana-mana pihak. Namun, untuk mencadangkan bahawa seorang penimbang tara sama sekali tidak boleh dibenarkan walaupun sedikit ruang untuk memanfaatkan kepakarannya sendiri untuk menentukan perkara merit adalah tidak masuk akal (lihat perenggan 26–27).

(3) Keseluruhan subseksyen yang dibaca secara sepintas lalu itu cukup memberitahu bahawa kuasa yang diberikan oleh subseksyen itu semestinya melampaui batasan mengenai perkara prosedur dan meliputi perkara fakta yang dipersoalkan kerana ianya juga termasuk kuasa untuk mengambilkira dan memberikan pemberatan, serta menentukan perkaitan dan kebolehterimaan mana-mana keterangan (yang jelas merupakan perkara merit dan inti pati s 21(3)(a) ATT). Oleh itu, isu (1) telah dijawab secara negatif. Kuasa penimbang tara di bawah s 21(3)(b) ATT tidak terhad kepada penentuan perkara prosedur (dan boleh

digunakan untuk menentukan perkara fakta, perkara asas dan merit) (lihat perenggan 34–35).

(4) Akhirnya, walaupun dengan melantik penimbang tara untuk menentukan pemberatan, perkara material, dan perkaitan mana-mana keterangan sama sekali bukanlah semata-mata soal prosedur. Pemberatan dan perkara material mengenai keterangan adalah perkara yang boleh menentukan fakta yang dipersoalkan secara langsung. Oleh itu, hujahan perayu terhadap 'pertikaian prosedur terdahulu' bukanlah tafsiran yang tepat mengenai peruntukan tersebut, atau cara di mana penimbang tara harus dibenarkan menggunakan fikirannya sendiri untuk memeriksa keterangan yang ada di dalam tribunal. Inilah sebabnya mahkamah tidak bersetuju bahawa tangan penimbang tara adalah 'terikat' melainkan timbulnya 'pertikaian prosedur sebelumnya'. Adalah sangat tidak masuk akal untuk mengandaikan bahawa Parlimen berniat untuk penimbang tara hanya boleh menggunakan fikirannya sendiri (dalam kepakaran dan pengetahuan) untuk menentukan kebolehterimaan, perkaitan, berat, dan perkara material mengenai keterangan (sama ada dokumentari atau viva voce) hanya apabila timbul pertikaian prosedur terdahulu (lihat perenggan 40).

(5) Walaupun mahkamah terkhilaf kerana bersetuju dengan HMT mengenai kewujudan pertikaian prosedur terdahulu, mahkamah masih boleh mendapati bahawa kemungkinan besar parlimen tidak akan bermaksud untuk undang-undang untuk menyekat kuasa penimbang tara untuk melaksanakan kewajipan keadilan asas atau timbang tara untuk menggunakan fikirannya untuk memeriksa dan menilai keterangan dalam tribunal sebelum membuat keputusan award timbang tara beliau. Mana-mana penimbang tara harus diberi ruang yang logik dan perlu untuk menggunakan fikirannya untuk memeriksa keterangan di hadapan tribunal tanpa mengira sama ada terdapat pertikaian prosedur terdahulu atau tidak. Untuk mengatakan yang sebaliknya adalah tidak masuk akal. Sehubungan itu, isu (2) telah dijawab secara positif. HMT adalah betul ketika memutuskan bahawa penggunaan kuasa penimbang tara di bawah s 21(3)(b) ATT adalah tidak pramatang (lihat perenggan 41–42).

(6) Rayuan membincangkan contoh di mana penimbang tara telah menggunakan kepakaran dan pengetahuannya sendiri terhadap keterangan yang ada. Ianya tidak masuk akal menurut undang-undang bahawa penimbang tara harus berunding dengan pihak-pihak sebelum menggunakan fikirannya sendiri kepada keterangan yang dikemukakan di hadapannya. Untuk mengatakan bahawa penimbang tara harus memberi notis yang sewajarnya atau 'berunding' dengan pihak-pihak untuk menggunakan kepakaran dan pengetahuan mereka dalam mengumpulkan dan menilai keterangan yang dikemukakan di hadapan

mereka adalah tidak masuk akal. Sekiranya mahkamah bersetuju dengan perayu, maka semua penimbang tara perlu menutup matanya sendiri terhadap perkara yang tidak betul (malah mengenepikan pengetahuan dan kepakarannya sendiri mengenai keterangan di hadapannya) semata-mata kerana undang-undang tidak akan membenarkan penimbang tara menggunakan kepakarannya tanpa terlebih dahulu 'berunding' dengan pihak-pihak. Yang mana 'prosedur' sedemikian akan menyalahi tujuan timbang tara sebagai alternatif kaedah penyelesaian pertikaian yang cepat dan tepat (lihat perenggan 50 & 52).

(7) Secara ringkasnya, seorang penimbang tara mempunyai hak yang sempurna dan berhak untuk menggunakan kemahiran dan kepakaran serta pengalamannya sendiri untuk menggunakan fikirannya dan membuat kesimpulan berdasarkan keterangan yang dikemukakan di hadapan tribunal. Persoalan pelanggaran keadilan semula jadi hanya timbul sekiranya penimbang tara telah menggunakan kepakarannya sendiri sehingga menerima keterangan luar yang tidak dikemukakan oleh pihak-pihak. Berdasarkan fakta kes ini, penimbang tara tidak mengabaikan keterangan saksi pakar dan penimbang tara juga tidak merujuk pertikaian pihak-pihak dengan keterangan lain yang dikemukakan di hadapan tribunal. Penimbang tara telah membuat pendapatnya sendiri setelah mempertimbangkan segala keterangan yang ada (lihat perenggan 54 & 58–59).

(8) Tiada sedikit pun proses pemikiran penimbang tara dalam keputusan beliau yang 'mengejutkan' kerana beliau membuat keputusan berdasarkan dokumen dan keterangan yang dikemukakan oleh pihak-pihak di hadapan tribunal. Tiada sedikit pun salah arah oleh penimbang tara yang menunjukkan beliau telah mengakui atau merujuk kepada sebarang keterangan luar. Proses analisis dan perbincangan sedemikian sememangnya diharapkan secara munasabah dan tiada pihak yang boleh mengatakan bahawa penimbang tara 'berunding' dengan pihak-pihak sebelum penimbang tara boleh membuat pemikirannya sendiri mengenai keterangan yang ada sebelum membuat keputusan timbang tara. Oleh itu, isu (3) telah dijawab secara positif. HMT adalah betul ketika memutuskan bahawa penimbang tara telah menggunakan kuasanya di bawah s 21(3)(b) ATT dan tidak melanggar prinsip keadilan semula jadi (lihat perenggan 60 & 62).]

Cases referred to

Burne v Young [1991] CP 68/89, HC (refd)

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11, FC (folld)

Eng Han Engineering Sdn Bhd v Toshiba Elevator (Malaysia) Sdn Bhd (dahulunya dikenali sebagai MS Elevators Engineering Sdn Bhd) and another case [2023] MLJU 1867, HC (refd)

Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc [2023] 7 MLJ 415, HC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (distd)
Nothman v London Borough of Barnet [1978] 1 WLR 220, CA (refd)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1, FC (refd)
Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452, HC (refd)
United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 21, 21(1), (2), (3), (3)(a), (3)(b), 33(3), 37(1)(b)(ii), (2)(b)
Interpretation Acts 1948 and 1967 s 17A

Appeal from: *Cobrain Holdings Sdn Bhd v Kasugi Prima Sdn Bhd and another case* [2023] MLJU 1794 (High Court, Kuala Lumpur)

Rajashree Suppiah (with Kuan Kai Tat and Amira Nur Nadia bt Azhar) (Rajashree) for the appellant.
Anilraj a/l Verdamanickam (with Tay Por Hai) (The Law Office of Anil & Tan) for the respondent.

Azimah Omar JCA:

INTRODUCTION

[1] The two appeals before us are appeals by the appellant against the High Court's decision dismissing the appellant's originating summon to set aside an arbitration award ('Appeal 1147') on the supposed ground of procedural impropriety in primary reliance of s 21(3)(b) of the Arbitration Act 2005 ('the AA') while at the same time allowing the respondent's application to recognise and enforce the same arbitration award ('Appeal 1146').

[2] Of course, like many disputations against an arbitration award, this supposed procedural impropriety was couched less as a dispute on merits but more so as a breach of natural justice of which the appellant seeks to persuade the court to set aside the arbitration award under ss 37(1)(b)(ii) and 37(2)(b) of the AA.

[3] Nevertheless, it was plain to us to see that the underlying dissatisfaction of the appellant was in truth against the merits and substance of the arbitration award. The appellant was in fact dissatisfied with the arbitrator's finding that time was at large (and only later at the appeal stage, the appellant had

A contended against the arbitrator's determination on merit and on the issue of quantum).

[4] In any case, the appellant's primary complaint of 'procedural impropriety' was mounted against the arbitrator's alleged improper or
B premature invocation of its authority under s 21(3)(b) of the Arbitration Act 2005 to decide and conclude the award by drawing on the arbitrator's own expertise (*and EXTRANEOUS EVIDENCE not furnished by any party*) despite of expert evidence already tendered before the tribunal by the parties.

C **[5]** On the contrary, the respondent simply contended that the invocation of the same authority was initiated by the appellant itself and that the learned arbitrator had drawn on her own expertise to collate and analyse *AVAILABLE EVIDENCE* which were already tendered by the parties before the tribunal.

D **[6]** The primary disputation led by the appellant was that the learned High Court judge ('learned judge') had failed to find that the learned arbitrator had over-extended her authority under s 21(3)(b) of the AA beyond it's 'procedural' confines and without first fulfilling the pre-requisites to invoke such an
E authority vested vide the provision.

[7] The appellant also contended that the learned arbitrator had unjustly and partially invoked the authority without due notice, and without affording an opportunity to respond to the parties.

F **[8]** In any case, we are minded (and the appellant's learned counsel during the hearing of the appeal had repeatedly intimated) that the core complaint and issue at hand was resoundingly only a matter of procedure. Although unfortunately, though not indulging too deeply into full-fledged substance or
G merits, we are still aware that the appellant is seeking (albeit indirectly) for a remedy to impugn the merit and substance of the arbitration award.

[9] In any case, we are also aware (nor are we inclined to) delve into the merits or substance of the arbitration award which would be a clear
H transgression of the limited and exhaustive scope of s 37 of the AA (to set aside an arbitration award).

BRIEF FACTS

I **[10]** Before we delve further into our deliberations, it is only apt that we briefly appreciate the underlying facts.

[11] Kasugi Prima Sdn Bhd ('the appellant') was the main contractor (appointed by Bank Rakyat) to undertake the construction of the Bank

Kerjasama Rakyat Malaysia Bhd building in Jalan Travers, Kuala Lumpur ('the project'). The respondent (Cobrain Holdings Sdn Bhd) was the subcontractor appointed by the appellant to undertake the M&E portion of the project via a letter of award dated 11 January 2010 ('LOA') read together with articles of agreement from PAM contract 2006 (without quantities) for the contract sum of RM82.2m (collectively 'the contract').

[12] The completion date was moved from the initial date of 31 December 2012–30 September 2013 with the certificate of practical completion being issued circa June 2014. The circumstances underlying this delay was the most prominent issue arising within the parties' disputation and litigation. Par the course, the appellant as main contractor sought to pin the blame for the delays against the respondent while effectively and unilaterally setting off and deducting the respondent's progress claims for work allegedly done while the respondent argued the exact inverse of the appellant's contention (in that the delays were caused by the appellant's own breaches and thus, time was already at large). In gist, the appellant contended that the respondent subcontractor not only was not entitled to any further progress payments but instead (upon unilateral omissions, variations, debit notes and liquidated ascertained damages ('LAD') for delays) the respondent owed the appellant the sum of RM6,367,876.15. On the contrary the respondent contended that the appellant still owed the respondent the sum of RM8,995,122.06 for work done under the contract.

[13] Again, it is not the court's role or within the court's jurisdiction to usurp the authority of the arbitral tribunal and pick apart the tribunal's findings and conclusions on these issues (on merits and substance). Thus, we are not intent on looking at the arbitral tribunal decision itself, but we are indeed vested with the authority to examine the process or procedure of the decision-making of the tribunal.

[14] While the parties were stagnated vide this deadlock (of the appellant's refusal to pay and the respondent's insistence for payment), the respondent (in hopes to break the deadlock) had commenced an adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for a swift determination as to the respondent's right to be paid for work done. The adjudicator on 25 October 2017 meted out an adjudication decision in favour of the respondent awarding the respondent the sum of RM5,477,387.23 and costs of RM102,689 ('CIPAA award').

[15] The appellant unsuccessfully sought to set aside the CIPAA award up the Federal Court level. Apart from failing to set aside the CIPAA award before the court, the appellant also concurrently referred their disputations to

A arbitration under the terms of the contract via an arbitration notice dated 18 September 2017.

[16] In due course of and before the final determination of the arbitration, the appellant still owed monies under the CIPAA award to the respondent. Thus, in the interim the parties entered into a consent order dated 15 March 2018 ('consent order 1') in which the appellant partially paid the respondent the sum of RM1.5m with the remainder balance unpaid were guaranteed by way of a property pledge pending the final determination of the arbitration.

[17] After 24 days of arbitral hearings, the learned adjudicator meted out her final award dated 22 August 2022 with two subsequent corrections respectively dated 26 August 2022 ('correction No 1') and 9 September 2022 ('correction No 2') in favour of the respondent (collectively the 'final award'), effectively finding that the appellant owed the respondent the award sum of RM7,485,867.56 ('award sum').

[18] However, the appellant refused to abide by the terms (the guarantee) under consent order 1 despite the arbitration having been finally determined. The appellant then set its sights to having the court to set aside the final award. In due course of the appellant's originating summon to set aside the final award, the parties entered into a further consent order dated 13 April 2022 ('consent order 2') now for the payment of the award sum under the final award. Only upon the intimations of winding up and execution proceedings did the appellant finally accede to make partial payments (albeit by instalments) to the respondent.

[19] Before the High Court, the respondent had filed an originating summon for the High Court to recognise and enforce the final award ('OS 40') while the appellant had filed an originating summon set aside the final award ('OS 46'). By 3 July 2023 the learned judge had allowed the respondent's OS 40 and accordingly dismissed the appellant's OS 46 on the following grounds:

(a) although the learned arbitrator had invoked her authority (to draw on her own expertise) under s 21(3)(b) of the Arbitration Act 2005, she had done so *WITH DUE CONSIDERATION of* (and *without excluding*) all other material evidence, documents, and expert witnesses from both sides of the parties:

20. From the said paragraph 4.49 (xiii) of the Award, I have thus noted that the Arbitrator had invoked section 21 (3) (b) of the Arbitration Act 2005, which is the power conferred upon the arbitral tribunal draw on her own knowledge and expertise, after she had considered:

(a) all the facts and circumstances available to her
(b) clause 34.8 of the Conditions of Contract
(c) the qualifications of the fact witnesses presented
(d) that the Project Director CW1 not able to remember, the Expert Witnesses CEW and REW2 having conflicting stand throughout and different qualifications
(e) all the documents before her.

(b) the appellant's reliance on the case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198 was misplaced as the learned arbitrator's invocation of her authority to draw on her expertise was not at all factoring any 'extraneous evidence' which was not tendered into by the parties. Instead the learned arbitrator had only drawn on her expertise so as to analyse and examine the expert evidence that were already furnished by both parties to culminate a middle ground to properly determine the dispute:

28. From the above, it is my finding that the Arbitrator was thorough in her approach with regards the Arbitrator's powers pursuant to section 21(3)(b) of the Arbitration Act 2005 as can be seen at paragraph 4.49 (xiii) of the Award referred to above where she had drawn inferences of fact from the evidence before her which was well within the Arbitrator's right, and thus her findings on the same should not be disturbed. Authority for this can be seen in ***Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc [2023] 7 MLJ 415***.

...

A

> 33. The decision in paragraph 4.49 of the Award must be read in relation to the entire Award and a perusal of the Award in its entirety will show that the Arbitrator had in fact considered the documents and material before her coming to her decision and findings.

B

> 34. Kasugi had also contended that the Arbitrator was precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond. Here I have not been shown that the Arbitrator had acted as such due to a lack of particulars provided and thus I have to also dismiss this argument as being unproven to the satisfaction of this Court.

C

D (c) the learned arbitrator had invoked her authority in full compliance of the 'pre-requisite' under s 21(2) of the AA when the parties were unable to agree on the procedure as to the classification and treatment of the parties' Part C documents;

E (d) there was never any breach of natural justice and the learned arbitrator was perfectly entitled (in fact was duty-bound or obliged) to apply her own mind in analysing and appreciating the contrasting expert evidence without having to first 'consult' the parties before penning down the final award; and

F (e) there was never any deprivation of the right to be heard as the learned arbitrator had only applied her expertise in analysing evidences already within the scope and jurisdiction of the arbitration and not at all in appreciation of any 'extraneous or external evidence' that were not tendered by the parties without affording any notice or opportunity to respond to the parties:

G

H

I

36. I must state that in the Award, I had found that the Arbitrator did apply her own 'thinking process' when she had inter alia

36.1 analysed the REW Expert Report on Delay to Completion of Works 17.2.2020

36.2 analysed the CEW Expert Report on Delay to Completion of Works 17.2.2020

36.3 looked at the Sequence of Works

36.4 looked at the Progress Claim and Progress Payment

36.5 looked at and analysed the Scott Schedule provided

36.6 analysed the certification process

36.7 found that the Respondent was deprived of the Master Work Programme

36.8 made a finding with regards the competence of the sub contractor who caused the stop work order

36.9 determined the substantial delay in the structural works

36.10 found the delay in the consultants drawings

36.11 found acts of prevention which impeded Cobrains submissions of shop drawings

[20] Dissatisfied with the learned judge's dismissal of the appellant's OS 46 to set aside the final award (and allowing the respondent's OS 40 to recognise and enforce the final award), the appellant filed the two appeals before us.

THE APPEALS BEFORE US

[21] We have perused the memorandums of appeal, the High Court's grounds of judgment, the records of appeal and the parties' respective written submissions and we are of the considered view that two appeals before us can be disposed off by determining the following three issues:

(a) issue 1: is an arbitrator's authority under s 21(3)(b) of the AA only invocable purely as to matters of procedures (and not of fact, substance or merit)?

(b) issue 2: whether or not the learned judge was correct to find that the learned arbitrator's invocation of her authority under s 21(3)(b) of the AA was not premature; and

(c) issue 3: whether or not the learned judge was correct to find that the manner in which the learned arbitrator had invoked her authority under s 21(3)(b) of the AA was NOT in breach of the rules of natural justice.

Issue 1: Is an arbitrator's authority under s 21(3)(b) of the AA only invocable purely as to matters of procedures (and not of facts, substance, or merit)?

[22] Before we delve into the manner in which the authority under s 21(3)(b) of the AA was invoked by the learned arbitrator, it is pertinent that

A we first appropriately appreciate the spirit and intent of the entire s 21 provision. Section 21's provision reads as follows:

21 Determination of rules of procedure

(1) *Subject to the provisions of this Act, the parties are free to agree on the procedure* to be followed by the arbitral tribunal in conducting the proceedings.

(2) Where the parties fail to agree under subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.

(3) *The power conferred upon the arbitral tribunal under subsection (2) shall include the power to —*

(a) determine the admissibility, relevance, materiality and weight of any evidence;

(b) *draw on its own knowledge and expertise*;

(c) order the provision of further particulars in a statement of claim or statement of defence;

(d) order the giving of security for costs;

(e) fix and amend time limits within which various steps in the arbitral proceedings must be completed;

(f) order the discovery and production of documents or materials within the possession or power of a party;

(g) order the interrogatories to be answered;

(h) order that any evidence be given on oath or affirmation; and

(i) make such other orders as the arbitral tribunal considers appropriate. (Emphasis added.)

[23] The core gripe of the appellant was that the learned arbitrator supposedly had wrongly invoked her authority to draw on her own knowledge and expertise upon matters of facts and substance. The appellant argued that the authority under this provision can only be exerted upon matters of procedures. This is largely contended in view of a supposed condition placed under s 21(2) of the AA within the same provision.

[24] Purely in the literal sense of the provision, the powers conferred under sub-s (3) may be invoked in circumstances where 'parties fail to agree under subsection (1)' (referring to parties' agreement as to the 'procedure to be followed'). Because of the literal restrictive tenor of sub-ss 1 and 2 of the provision, the appellant argued that the authority conferred under sub-s 3 can only be invoked as to matters of procedure.

[25] We are aware and can similarly identify the restrictive tenor of the provision when the provision is interpreted in a strict and literal manner. Nevertheless, we are also equally aware that such strict and literal interpretation of the provision (against the spirit of the statute and other provisions of the same) would lead to a consequence that is either erroneous or otiose. It is altogether absurd to suggest that an arbitrator can only draw on their expertise and knowledge (of which clearly would be a great asset to an arbitration) only on matters of procedures. Despite the literal words contained within the provision, we cannot simply sit idly by and allow such erroneous reading of the law defeat the very core of the law to have disputations remedied with utmost integrity, information, knowledge, and experience.

[26] Whether or not an arbitrator had drawn on its own expertise to the improper extent of admitting foreign or extraneous evidence (outside of the forum) or only to the appropriate extent of analysing available evidence within the forum is altogether a different matter of levels. The irrefutable fact remains that the appellant ought not contend that s 21(3)(b) of the AA would act as an inhibitor to prohibit an arbitrator from drawing on to his or her own knowledge and expertise to determine the merit and substance of the dispute (beyond the technicalities of procedures or curial law).

[27] The law shall not stand in any manner that stifles intellect, justiciality, and intelligence. At best and at most, the appellant can reasonably suggest that the arbitrator ought not excessively draw on her own expertise to the extent of the arbitrator descending into the arena and furnishing new and external evidence which were never tendered into by any respective party. But to suggest that an arbitrator cannot at all be allowed even a modicum of room to tap into his or her own expertise to determine matters of merit is sheer absurdity.

[28] The overriding preference for purposive interpretation over an absurd literal interpretation of statutes is already a feature within our written law under s 17A of the Interpretation Acts 1948 and 1967 which reads as follows:

> In the interpretation of a provision of an Act, *a construction that would promote the purpose or object underlying the Act*
>
> (whether that purpose or object is expressly stated in the Act or not) *shall be preferred* to a construction that would not promote that purpose or object.

[29] It is also apt to refer to the salutary words of Lord Denning MR in the case of *Nothman v London Borough of Barnet* [1978] 1 WLR 220**:**

> In all cases now in the interpretation of statutes, we *adopt such a construction as will 'promote the general legislature purpose' underlying the provision. IT IS NO LONGER NECESSARY FOR JUDGES TO WRING THEIR HANDS AND SAY: 'THERE IS NOTHING WE CAN DO ABOUT IT'*. Whenever the strict interpretation of a statute gives rise to an *absurd and unjust situation*, the judges can and should *use their*

A *good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done*, had they had the situation in mind.

[30] Within our own shores, the Federal Court in *United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 also
B expressed the same sentiment in preferring a purposive approach over a strict literal interpretation of a statute:

> Then, in my view, it is a matter for the *purposive approach to replace the literal*. As was said by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 899, the *literal method of construction is now completely out of date and has been replaced by a 'purposive approach'*. It ought to be noted that this purposive approach is not a modem fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': Coke 4 Inst 330.

D

[31] We also refer to the guiding words of the Federal Court in the case of *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11:

> *That is if the literal approach of interpretation is taken. Such an interpretation would lead to an ambiguity and absurdity as a Regent exercising the functions of the Ruler is not a Ruler for the purposes of art 181(2)*, the Third Schedule and the Fifth Schedule and hence the Regent can be sued in the ordinary courts as the establishment of the special court by the amendment to art 181(2) is exclusively reserved to the Rulers personally in respect of actions in their personal capacity but for the purposes of arts 182 and 183, he is the Ruler and shall sue or be sued in the special court for the reason that the meaning of 'Ruler' in art 160(2) para (b) remain intact.
>
> ...
>
> *In order to resolve the ambiguity or absurdity situation, we need to consider the purpose or object of establishing the special court*, that is, whether the exclusive jurisdiction of the special court to try offences committed in the Federation by the Ruler of a State and all civil cases by or against the Ruler of a State notwithstanding where the cause of action arise is to include a person exercising the functions of the Ruler of a State as in the case of the plaintiff here?
>
> As stated earlier *s 17A of the Acts* (effective from 24 July 1997 vide Act A996/97) *now permits for a purposive approach* quite apart from the authorities cited earlier on. It has been given, so to say, statutory recognition.

[32] With the above precedents and statutory principle in mind, we are certain that the very purpose and objective of the Arbitration Act 2005 must
I not have been to inhibit the arbitrator's own expertise and knowledge of arbitrators only to be applied upon matters of procedure. The Federal Court most recently in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1 ('Pancaran Prima') had addressed the scope in which the arbitrators may draw on their own expertise and knowledge under

s 21(3)(b) of the AA and duly found that the same authority can be drawn even to determine matters of substance and merit (and not only matters of procedure).

[33] In *Pancaran Prima*, the Federal Court had upheld an arbitrator's conduct of drawing on its own knowledge and expertise in determining a claimant's entitlement to the rate of profits (which was clearly a matter of substance and merit of the claim):

> [78] It is important to appreciate that a determination under s 21(3)(b) *is ONE OF FACT and not of law. In form and spirit, the provision clearly allows the arbitral tribunal to DRAW ON ITS OWN KNOWLEDG E AND EXPERTISE on any FACT IN ISSUE which it is acquainted with*. What the respondent was suggesting in effect was that there must be actual 'evidence' before the arbitral tribunal before it could draw on its own expertise and knowledge in arriving at such finding of fact.
>
> [79] It must also be appreciated that the power vested in the arbitral tribunal by s 21(3)(b) to 'draw on its own knowledge and expertise' is a power that is conferred by statute and not a power that is derived from some common law principles. But of course common law authorities where relevant provide useful guidance in interpreting the provision.
>
> ...
>
> [100] To the argument that actual evidence (in this case evidence of the 10–15% no risk profit margin for P&A) must be produced before the arbitral tribunal before it could draw on its own knowledge and expertise under s 21(3)(b), we can only say that such argument has a tendency to defeat the object behind the provision rather than to put its object into effect and must be rejected.
>
> [101] *The construction if accepted will render the provision completely otiose and denuded of all meaning, contrary to the trite principle that Parliament does not legislate in vain. Heed must be taken of s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes.*
>
> [102] *Effect must therefore be given to s 21(3)(b) of the Act in order to follow through with Parliament's intention to allow the arbitral tribunal to draw on its 'own knowledge and expertise'. Actual evidence is the very antithesis of a person's own knowledge and expertise*. Unless it can be shown that the arbitrator's own knowledge and *EXPERTISE ON ANY FACT IN ISSUE* is plainly and unarguably wrong, the court must be very slow to interfere with his findings. (Emphasis added.)

[34] In any case, it is critical that we understand the overall tenor of the provision alongside all of the other authorities prescribed under s 21(3) of the AA. And a cursory reading of the entirety of the subsection is sufficiently telling that the authority vested by the subsection must necessarily go beyond the confines of procedural matters and cover matters of facts in issue as it also includes the authority to attach materiality and weight to, as well as determining the relevance and admissibility of any evidence (which clearly is a matter of merit and substance) (see s 21(3)(a) of the AA).

[35] Thus, considering all of the above deliberations under this heading we answer *Issue 1 in the NEGATIVE*. An arbitrator's authority under s 21(3)(b) of the AA is NOT LIMITED to only determine matters of procedures (and can be invoked to determine matters of facts, substance, and merit).

Issue 2: Whether or not the learned judge was correct to find that the learned arbitrator's invocation of her authority under s 21(3)(b) of the AA was not premature

[36] Apart from the appellant's erroneous contention on the scope of the arbitrator's authority under s 21(3)(b) of the AA, the appellant also argued that the statute prescribed a condition precedent before an arbitrator can exert its authority under s 21(3) of the AA. The appellant argued that before invoking any of the authorities prescribed under the subsection, there must first be a disagreement as to procedure. This is largely due to the stipulation under s 21(2) of the AA.

[37] As against this contention, it was highlighted by the respondent (and identified by the learned judge) that there had already been discord and disagreement as to procedure to the extent that even the appellant itself had explicitly urged the learned arbitrator to invoke her authority under s 21(3)(b) of the AA to exert her own expertise and experience to best identify the proper treatment, classification, and examination of the evidence (both oral and documentary) that were presented before the tribunal. This procedural disputation was clearly recorded within the learned arbitrator's order for directions No 20 in which the learned arbitrator had, inter alia, directed that:

> 4. The Counsels shall have a separate meeting to check the status of the additional documents in dispute and the weight each Party will attach to the additional documents presented or to be presented during the hearings.
>
> 5. Both Parties may have considerable differences of opinions and in documents and oral evidence during the Hearings. The Arbitrator will consider the facts drawn from the documents and as verified by the respective Parties depending on the weight of responsibility and obligations of the respective Parties expressed in the Contract Conditions, statutory regulations and industry practice.

[38] In fact, it was the appellant who had implored (via the appellant's own submissions) for the learned arbitrator to draw on her authorities under s 21(3)(a) of the AA to best deal with the evidence presented before the tribunal:

(d) For those documents which CHSB claim to have not seen or received before, this does not constitute that those documents never exist at all;

(e) In any event, the Tribunal is empowered under **section 21(3)(a) Arbitration Act 2015 (Tab 3, CBA 1, pg. 64)** to determine the admissibility, relevance, materiality and weight of any evidence. Only in very rare circumstances where the Tribunal may exclude relevant evidence. See **Arbitration In Malaysia, A Practical Guide at paragraphs 9.041 & 9.042 (Tab 4, CBA 1, pg. 69-70)**;

[39] As aptly highlighted by the respondent, if the appellant was more than eager to urge the arbitrator to exert her authority under the same provision to deal with and determine the admissibility of its documentary evidence, then by the same logic the appellant should be equally ready to allow the arbitrator to exert her authority to draw on her expertise to deal with and determine the conflicting expert evidence furnished by both parties.

[40] At the end of the day, even calling on the arbitrator to determine the weight, materiality, and relevance of any piece of evidence is not at all strictly just a matter of procedure. The weight and materiality of evidence is a matter that can directly determine a fact in issue. So the appellant's insistence on a 'prior procedural disputation' is neither exactly an accurate interpretation of the provision, nor the manner in which the arbitrator should be allowed to apply her own mind to examine the evidence available within the tribunal. This is exactly the reason we are not inclined to agree (despite the literal words contained within the provision) that the arbitrator's hands are 'tied' until and unless there arise a 'preceding procedural disputation'. It is exceedingly absurd to suppose that the parliament would have intended that an arbitrator can only apply his or her own mind (in expertise and knowledge) to determine the admissibility, relevance, weight, and materiality of evidence (either documentary or viva voce) only when there arose a prior dispute of procedure.

[41] Thus, even if we were wrong in agreeing with the Learned Judge as to the existence of a prior procedural dispute, we are still inclined to find that it is more probable than not that the parliament would not have intended the law to unnecessarily restrict the arbitrator's authority to perform the very cornerstone of justicial or arbitral duty to apply his or her mind to examine and appreciate evidence within the tribunal before concluding his or her arbitral award. Any arbitrator should be allowed the logical and necessary room to exert his or her mind to examine the evidence before the tribunal notwithstanding whether or not there was a prior procedural dispute. To insinuate otherwise

would be preposterous. We similarly refer to s 17A of the Intrepretation Act 1967 and the authorities we alluded to above to prefer our purposive approach of interpreting s 21(1)(3) of the AA in the same manner that the Federal Court had preferred in *Pancaran Prima*:

> [101] The construction if accepted will render the provision completely otiose and denuded of all meaning, contrary to the trite principle that Parliament does not legislate in vain. Heed must be taken of *s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes.*
>
> [102] *Effect must therefore be given to s 21(3)(b) of the Act in order to follow through with Parliament's intention to allow the arbitral tribunal to draw on its 'own knowledge and expertise'*. Actual evidence is the very antithesis of a person's own knowledge and expertise. Unless it can be shown that the arbitrator's own knowledge and expertise on any fact in issue is plainly and unarguably wrong, *the court must be very slow to interfere with his findings*. (Emphasis added.)

[42] Upon our deliberations and findings under this heading, we accordingly answer *Issue 2 in the POSITIVE*. The learned judge was indeed correct to find that the learned arbitrator's invocation of her authority under s 21(3)(b) of the AA was not premature.

Issue 3: Whether or not the learned judge was correct to find that the manner in which the learned arbitrator had invoked her authority under s 21(3)(b) of the AA was not in breach of the rules of natural justice

[43] Apart from the appellants' contentions of a 'procedural pre-requisite' (which we have dismissed above) the appellant also argued that the manner in which the learned arbitrator had drawn on her own expertise and knowledge had deprived the parties off of their rights to natural justice (more precisely being the right to be heard). In gist, the appellant's complaint can be segmented into two:

(a) the learned arbitrator had factored in EXTRANEOUS/EXTERNAL EVIDENCE that were not tendered before the tribunal; and

(b) the learned arbitrator had referred to extraneous evidence without due notice or consultation and opportunity for the parties to address or respond to the extraneous evidence.

[44] The appellant staunchly relied upon the case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198 ('Master Mulia') to support the appellant's contention. However, a cursory glance upon the judgment and facts of *Master Mulia* would already reveal the error in the appellant's argument. We agree with learned counsel for the respondent that neither the legal principle nor the facts in *Master Mulia* bear any resemblance or relevance to the present

appeal. For clarity's sake we tabulate the dissonance between *Master Mulia* and the appeal before us in table 1 below:

TABLE 1

The appeal before us	*Master Mulia* case
The arbitrator applied her expertise upon AVAILABLE EVIDENCE already tendered by the parties before the tribunal (being the documents and expert witnesses' testimonies)	The arbitrator applied her expertise upon two distinct pieces of EXTERNAL EVIDENCE
The appellant never proven or ever clearly referred to any specific pieces of 'external evidence' aside from merely referring to the arbitrator's expertise or knowledge applied upon the documents and the parties' respective expert witnesses' testimonies	The two pieces of external evidence (were distinct and were clearly identified, factored in, and replied upon by the arbitrator
The documents and expert witnesses' testimonies were all already tendered before the tribunal by both respective parties	The two pieces of external evidence were neither contended nor even tendered before the tribunal by any of the parties
The learned arbitrator's draw upon her own expertise and knowledge (upon available evidence) was explicitly referred to her authority vested under s 21(3)(b) of the AA.	Did not at all refer to or rely upon s 21(3)(b) of the AA

[45] Starkly dissimilar and distinguishable from the present appeal, the Federal Court in *Master Mulia* dealt with an arbitral award in which the arbitrator had not only applied his own mind upon available evidence tendered before the tribunal, but even went to the improper extent of inadvertently tendering and relying upon external evidence that none of the parties had ever tendered into the tribunal. It was not at all a case where the arbitrator was applying his or her own mind to break a deadlock or stalemate between two competing available evidence.

[46] In *Master Mulia*, the appellant had chartered the respondent's vessel (equipped with a stinger hitch) for the purposes of carrying out installation works of undersea pipelines for a set amount of time. The appellant had delayed the return of the vessel to the respondent beyond the agreed time for return. Thus, the respondent commenced an action against the appellant for losses for the appellant's delay and breach of contract. In concluding his arbitral award, the arbitrator had referred to and relied upon two distinct pieces of evidence (which were never contended by any of the parties) on what the

arbitrator believed to have caused the delay of the vessel's return and the damage upon the vessel's stinger hitch and hull. At the Court of Appeal stage, the Court of Appeal had identified the two external evidence that were explicitly mentioned by the arbitrator, and that the arbitrator even admitted that the *two external evidence WAS NEVER INVESTIGATED BY SCIENTIFIC OR METALLURGICAL METHODS by any of the parties*. Despite none of the parties even investigating these 'external evidence' the arbitrator had based his conclusion on these external evidence supposedly on the balance of probabilities:

> [41] In the present appeal, the learned JC found that the appellant had indeed established the two instances of breaches of natural justice after considering the effect and implication of ss 20, 21, 25 and 26 of the Act. Section 20 provides that an arbitrator shall treat parties equally and that each of them must be given a fair and reasonable opportunity to present its case, while ss 21, 25 and 26 deal with various procedural matters and the related powers of the arbitrator that are to be attended to in the arbitration. After considering the meaning and implication of these provisions, according to the learned JC, *the learned arbitrator 'seemed to have considered and accepted two pieces of 'extraneous evidence' (not adduced by the plaintiff and defendant)'* at para 407 of the award. Those two pieces of extraneous evidence were:
>
> (a) 'weather induced erratic stress and loading' subjected the structural members of the Stinger Hitch to fatigue; and
>
> (b) 'continuous excessive loads accentuated by severe weather during the week, resulted in the cracking of the plate'.
>
> [42] Although admitting that 'This cause even though not investigated through metallurgical or scientific methods of material analysis of the failed member (cracked plate) by the parties', the learned arbitrator proceeded to say that 'on the balance of the probabilities, the Tribunal finds that the damage is sustained due to continuing operations of the stinger and the vessel in severe weather conditions by the respondent, prior to and on the day the damage was discovered'. (Emphasis added.)

[47] Without any doubt, we are in full agreement with the Court of Appeal and Federal Court in *Master Mulia*'s case that in such case where the arbitrator had descended into the arena to suppose his own evidence, then it is only appropriate that the arbitrator duly notify and afford the parties of the proper opportunity to address or respond to the arbitrator's external evidence. The Federal Court held as follows:

> [60] Whilst the appellant's argument focused on paras [34]–[35] of the Court of Appeal's written judgment, we think it is also necessary to advert to paras [87] and [90]–[92] of the written judgment which dealt with the two pieces of extraneous evidence. *The Court of Appeal found that the two pieces of extraneous evidence were relevant and material* to the issue of causation of the damage to the stinger hitch, and *the evidence in question were considered by the arbitrator without informing the parties until the award was rendered, by which time it was too late*. As such, the case which

had been submitted for arbitration had been redefined by the arbitrator without giving the parties the opportunity to present their responses. We are therefore in agreement with the views expressed by the Court of Appeal in paras [90]–[92] of the written judgment:

> ... *that without these two pieces of extraneous evidence which were never put to the parties, the arbitration would also have reached a different outcome*. As such, the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration. (Emphasis added.)

[48] However, none of the factual matrix in *Master Mulia* was similar or applicable *mutatis mutandis* to the appeal before us. Starkly dissimilar to *Master Mulia*, the evidence referred to by the arbitrator (in applying her expertise and knowledge) *were AVAILABLE EVIDENCE that the parties themselves had tendered into the arbitration*. The entirety of the appellant's seemingly grievous complaint was but merely against A SINGULAR PARAGRAPH of the final award in para 4.49(xiii) of the final award which reads as follows:

> (xiii) Reliability of Respondent's expert witnesses Considering all the *facts and circumstances available* to the Arbitrator for this arbitration, Para 450(iii) and in accordance with Clause 34.8 of the Conditions of Contract, I find and hold that due to *the qualifications of the fact witnesses presented*, the *Project Director CWI not able to remember, the Expert Witnesses CEW and REW2 having conflicting stand throughout and different qualifications*, the Arbitrator has studied all the documents and *decided based on Section 21.3(b) of the Arbitration Act 2005*.

[49] To date, even after a myriad of litigation the appellant had not referred to any other paragraph within the final award (aside from the above) in which the appellant contended to have considered an external evidence which were never tendered by any of the parties. Furthermore, the appellant had not raised the contention that the arbitrator had not given his reasons for her decision under s 33(3) of the AA. Thus, it can only glean that the evidence in which the learned arbitrator intended to apply her expertise and knowledge to must necessarily be the available evidence (particularly the expert witnesses' evidence that the arbitrator had explicitly mentioned).

[50] As we have mentioned at the beginning of this judgment, markedly distinguishable from the case of *Master Mulia*, the appeal before us instead dealt with the instance in which the arbitrator had drawn upon her own expertise and knowledge to be applied as against AVAILABLE EVIDENCE (which in no manner whatsoever required the arbitrator to give due notification or opportunity to rebut to the parties). It does not make any legalistic sense that an arbitrator must necessarily consult the parties before applying his or her own mind to the evidence presented before him or her. This distinction had in fact been explained by the Federal Court in *Pancaran Prima*:

A [84] The learned judge went on to say that an arbitrator:

> *can and should use his special knowledge so as to understand the evidence that is given — letters that have passed — usage of the trade — the dealings in the market — and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge — or at any rate he should not use it — so as to provide evidence on behalf of the defendants which they have chosen not to provide for themselves.* For then he would be discarding the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiff's experts — without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong.

[85] Lord Denning in the above passage was of course speaking of the need for the arbitrator to be impartial and not to assume the role of advocate for the 'defaulting side' (who in that case was unrepresented). *What the learned arbitrator in the present case did was precisely what Lord Denning had in mind, ie to use his special knowledge 'so as to understand the evidence that is given* — letters that have passed — usage of the trade — the dealings in the market — and to appreciate the worth of all that he sees upon a view'. (Emphasis added.)

[51] Thus, there is a distinct difference between an arbitrator who draws on his own expertise to the extent of descending into the arena to contend pieces of evidence (which were not tendered by the parties), and an arbitrator who draws on his expertise only to the extent of analysing and appreciating the evidence tendered before the tribunal by the parties themselves. The present appeal here is the instance of the latter.

[52] It is altogether commonplace that arbiters (be it arbitrators or even justices) would at times be aware of legal positions, relevant rules of law, or conventions or usages which the parties might not have considered or were aware of. To implore an arbiter to give due notice or to 'consult' the parties every time they see it proper to draw on their expertise and knowledge in collating and appreciating the evidence tendered before them (or even consider an alternative point of view within the confines of the same evidence) is certainly preposterous. If we were to agree with the appellant, then all arbitrators would have to turn a blind eye to any parties' oversight (or to his own valuable knowledge and expertise upon the evidence before him) merely because the law would not have allowed the arbitrator to draw on his expertise without first 'consulting' the parties. Of which such a 'procedure' would have defeated the very essence of arbitration as a swift and timeous method alternative dispute resolution. This sentiment was expressed by Neazor J of the Wellington High Court in the case of *Burne v Young* [1991] CP 68/89:

> The case is not one in which it can be said that the arbitrator has introduced a new idea of his own on which the parties (whose rights are what is in issue, not those of the witness) have not been able to comment or adduce evidence. What happened

here was not 'a new point which occurred to the arbitrator' which involved a complete departure from the course of the litigation up to that time and which was never raised or argued before the arbitration. *Nor does it involve the arbitrator considering material not put before him by the parties, or even making a decision based on his own knowledge without giving the parties the opportunity to present a different view.*

The question comes down to whether the arbitrator, whose function is to hear and decide, has any obligation to say to a witness words to the effect 'THIS IS THE CONCLUSION I PRESENTLY EXPECT TO DRAW FROM WHAT YOU HAVE SAID; DO YOU WANT TO SAY MORE ABOUT THE POINT?' If there was such an obligation litigation of any kind would be likely to be PROLONGED, and the *decision maker would at least appear to be drawn into the arena* by ensuring that the limit of every witness' knowledge of the matter had been defined. (Emphasis added.)

[53] This is more apparent in the appeal before us considering the arbitrator sought to draw on her expertise when analysing the contrastive expert witnesses' evidence that were tendered by the parties. It is an arbitrator's ardent discretion to apply his or her own mind to formulate his or her own opinion after considering the expert evidence tendered by the parties. The arbitrator need not to mechanistically undertake an either/or approach to merely adopt either one of the parties' expert evidence. We agree with the learned judge's reference to the decision of Liza Chan JC (as Her Ladyship then was) in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 7 MLJ 415 (which was later affirmed by the Court of Appeal):

[44] In dealing with this complaint, I am guided by the approach in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, where the Singapore Court of Appeal in dealing with the argument of a breach of natural justice raised in an attempt to set aside an arbitral award explained at p 119 as follows:

It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. *The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him.* In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, *neither is he expected to consult the parties on his thinking process before finalising the award* unless it involves a dramatic departure from what has been presented to him. *Each case should be decided within its own factual matrix*. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; *rather* an award should be read generously *such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied*. (Emphasis added.)

[54] Succinctly, an arbitrator is perfectly vested and entitled to draw on his or her own wealth of expertise and experience to apply his or her mind and to draw conclusions (or even alternative points of view) upon the evidence that was presented before the tribunal (nor should it be expected upon an arbitrator to first consult the parties before he or she decides to do the same). The question of breach of natural justice only arises if an arbitrator had applied his or her own expertise to the extent of admitting pieces of external evidence which were not tendered into by the parties.

[55] A parallel can be drawn to the commonwealth case of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ('Rotoaira') in which the issue of breach of natural justice was contended when the *arbitrator had opted for an alternative method of calculation of his own after considering both parties' proposed methods of calculation* to identify the appropriate rate of rent review based on the percentage of the stumpage received from the sale of timber.

[56] In *Rotoaira*, the plaintiff-trust owned a piece of land in which it had leased to the Crown (government of New Zealand) for a distinct contractual period (for purposes of forestry). The lease terms also provided for periodic rent review based on a percentage of the stumpage received from the sale of timber extracted from the leased land. The plaintiff-trust insisted on a 'residual model' of calculation, while the Crown supposed on a 'contributions model' of calculation. The plaintiff-trust contended that the arbitrator had breached the rule of natural justice when he had 'substituted' the method of calculation suggested by the parties with his own method of calculation which the arbitrator had not given the parties the opportunity to respond against it.

[57] The Auckland High Court found that there had not been any breach of natural justice and that the arbitrator ought not to be expected to give notice or opportunity to the parties to respond to his deliberation or thought process behind his conclusions. The position in *Rotoaira* was referred to and even adopted by the Federal Court in the *Pancaran Prima* case:

> [94] The Court of Appeal relied on two cases from New Zealand, namely *Trustees of Rotoaira Forest Trust v Attorney- General* [1999] 2 NZLR 452 *and Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 as the law in New Zealand is similar to ours in respect of setting aside applications under s 37 of the Act with r 34(2)(b)(ii) read with r 34(6)(b)(i) and (6)(b)(ii) of Schedule 1 to the Arbitration Act 1996 of New Zealand ('the New Zealand Act').
>
> [95] *Section 21(3)(b) of the Act is also similar to s 3(1)(b) of the New Zealand Act. Rotoaira laid down ten principles* to be applied in cases of setting aside an award for breach of the rules of natural justice alleging lack of opportunity to be heard on the arbitrator's knowledge and expertise, as follows:

(a) arbitrators must observe the requirements of natural justice and treat each party equally;

(b) the detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise;

(c) as a minimum each party must be given a full opportunity to present its case;

(d) in the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument;

(e) in the absence of express or implied agreement to the contrary, *the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond;*

(f) the last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing;

(g) *on the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented*, and exercise reasonable latitude in drawing their own conclusions from the material presented;

(h) *nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his menta lprocesses before he finally commits himself;*

(i) it follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result; and

(j) once it is shown that there was significant surprise it will be reasonable to assume procedural prejudice in the absence of indications to the contrary. (Emphasis added.)

[58] It was exceedingly obvious to us (and neither did the appellant was close to proving otherwise) that the manner in which the arbitrator in the appeal before us had drawn on her expertise squarely fits para 95(g) of the decision of the Federal Court in *Pancaran Prima*. As had been clearly highlighted by the respondent, the learned arbitrator neither ignored the evidence of the expert witnesses' nor did the arbitrator substituted the parties' contentions with her own external evidence beyond the evidence that were presented before the tribunal.

[59] The learned arbitrator had formed his own opinion upon due consideration of AVAILABLE evidence (that were submitted by the parties) as follows:

(a) analysed and summarised the REW expert report in para 4.35 of the final award;

(b) referred to the CEW expert report in para 4.36 of the final award;

(c) referred to Cobrain's Scott Schedule Report at long length in paras 4.41–4.44 of the final award;

(d) considered the testimony of CW3 together with cl 34.8 of the conditions of contract and concluded that delay was caused by the appellant's failure to provide the respondent a proper master work programme (para 4.49(ii) of the final award);

(e) considered the facts and documents available within the tribunal and concluded that time is at large as there were acts of prevention (the other subcontractor for structure's incompetence causing the issuance of DBKL stop work order, delays in site handover, and hindrances on site causing difficulties in conducting M&E works by the respondent; substantial delay in obtaining the consultant's drawing) (para 4.49(iii) of the final award);

(f) accepted and adopted the assessment of Cobrain's expert witness (REW2) and allowed Kasugi's set off only to the extent of RM684,083.05 (para 4.49(viii) of the final award);

(g) appreciated and identified that the appellant's consultant (HSK) had failed to assess the variations listed out in the Scott's Schedule and preferred to adopt the assessment by the respondent's expert (REW2) assessment of RM8,731,970.53 (para 4.49(ix) of the final award); and

(h) appreciated and analysed the reliability of the numerous expert witnesses (para 4.49(xiii) of the final award).

[60] It was resoundingly clear that not a spec of the learned arbitrator's thought process in her deliberations were even remotely 'surprising' as she had

only agonised over documents and testimonies that were tendered by the parties before the tribunal. There was not even an iota of deviation by the arbitrator in which she had admitted or referred to any external evidence. Such process of analysis and deliberation should certainly be reasonably expected and no party can insist upon the arbitrator to 'consult' the parties before the arbitrator can embark on his or her own thought processes upon the available evidence before concluding the arbitral award.

[61] It is also opportune for us to refer to the very recent case of *Eng Han Engineering Sdn Bhd v Toshiba Elevator (Malaysia) Sdn Bhd (dahulunya dikenali sebagai MS Elevators Engineering Sdn Bhd) and another case* [2023] MLJU 1867 in which the High Court had dealt with the same contention on breach of natural justice:

> [27] On the issue of EHE not been given an opportunity to challenge the Arbitrator's chain of reasoning, I hold that the *Arbitrator by drawing on her own experience had not acted unreasonably as the same was foreseeable and that the Arbitrator IS NOT EXPECTED TO CONSULT THE PARTIES ON HER THINKING PROCESS*. This also could not be said to be a significant surprise to EHE, so much so that the failure by the Arbitrator to give it the opportunity to submit on the issue had resulted in a serious breach of the rules of natural justice. See the New Zealand case of *Trustees of Rotoaira Forest Trust v Attorney- General* [1999] 2 NZLR 452. (Emphasis added.)

[62] In view of all of the aforementioned findings and deliberations under this heading, we hereby answer Issue 3 in the *POSITIVE*. The learned judge was correct to find that the manner in which the learned arbitrator had invoked her authority under s 21(3)(b) of the AA was not in breach of the rules of natural justice.

OUR DECISION

[63] Considering our answers in Issues 1,2, and 3 above, we are thus of the view that both of the appellant's appeals (Appeal 1146 and Appeal 1147) here are totally devoid of merits and we hereby dismiss both of the appeals with costs.

Appeals dismissed.

Reported by K Selvaraju